U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: February 1, 1999

Case No.: 1996-INA-0037

In the Matter of:

GIL SHIVA,
Employer

On Behalf Of:

RAMSES BORGES,
Alien

Certifying Officer: Dolores DeHaan, Region II

Appearance: David J. Rothwell, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On January 4, 1994, Gil Shiva ("Employer") filed an application for labor certification to enable Ramses Borges ("Alien") to fill the position of Butler (AF 4-5). The job duties for the position are:

> Supervise and coordinate activities of household employee. Engaged in cooking, cleaning and related domestic duties. Oversee serving of lunch and dinner, set table and personally serve meals. Mixing and serving cocktails. Answer telephone and deliver messages. Receive and announce guests. Keep silver service clean.

The requirements for the position are two years of experience in the job offered or two years of experience as a Housekeeper, and references. The Employer noted the work schedule as being Monday, Tuesday, Thursday, Friday, and Saturday from 9 a.m. to 1 p.m. and from 5 p.m. to 9 p.m.[2]

The CO issued a Notice of Findings on April 7, 1995 (AF 35-37), proposing to deny certification on two grounds" Employer's alternative experience requirement is restrictive, thereby violating 20 C.F.R. § 656.21(b)(6); and, Employer improperly advertised the job offer, thereby violating 20 C.F.R. § 656.21(g). Specifically, the CO found Employer's alternative experience requirement of two years as a Houseworker, General to be restrictive because such experience does not qualify one to perform the duties of Butler, which are generally supervisory in nature. (AF 36). The CO directed Employer to rebut the restrictive requirements finding by either amending those requirements or documenting how they arose from business necessity. (AF 36). The CO further found Employer's newspaper advertisement of the position offered to be unacceptable due to the fact that it did not appear in the "household help" section of the classified ads. (AF 35-36). The CO directed Employer to rebut the unacceptable advertising finding by expressing a willingness to re-advertise. (AF 35). Accordingly, Employer was notified that it had until May 12, 1995, to rebut the findings or cure the defects noted. (AF 37).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] On June 2, 1994, the Employer amended the ETA 750A form by changing: (1) the rate of pay to $450 per week; (2) the work schedule to Monday, Tuesday, Thursday, Friday, and Saturday from 9 a.m. to 5 p.m.; and, (3) two years of experience in the related occupation of Houseworker General (AF 12-15).

In its rebuttal dated May 11, 1995 (AF 40-41), Employer addressed the CO's concerns. Regarding the alternative experience requirement, Employer argued that for from being restrictive, the requirement increase the pool of potentially qualified applicant. (AF 41). Employer further argued that the requirement was "business related," because a butler supervises the household staff and, thus, experience as a member of that staff is a "completely logical" requirement. (AF 41). It is a common business practice, according to Employer, "for the supervisory employees to be drawn from the pool of people who previously worked as the supervised workers." (AF 40-41). Employer continued, writing that "the person performing the supervisory duties has to be experienced with the work to be performed." (AF 40). Employer concluded that "[b]y performing the duties of a houseworker, ... the person acquires the necessary knowledge and experience to be able to supervise others doing those tasks." (AF 40).

Regarding it advertisement of the job offered, Employer noted that the state agency had not instructed it to place the ad in the "household help" section of the paper. (AF 40). Employer further noted that the paper in which the ad was approved to run does not have a separate "household help" section in its classified ads. (AF 40).

The CO issued the Final Determination on June 8, 1995 (AF 42-44), denying certification on the ground that Employer failed to document business necessity of the alternative experience requirement, thereby violating 20 C.F.R. § 656,21(b)(6). The CO took note of Employer's rebuttal, but found it unpersuasive. The CO repeated its belief that experience as a Houseworker, General does not qualify one to work as a butler. (AF 43). The CO noted that while promoting workers to supervisory positions is indeed a common business practice, this argument is irrelevant because Employer has not employed the Alien as a Houseworker, General and therefore cannot promote him to Butler. (AF 42). Because of Employer's failure to comply fully with the regulations, the application for alien labor certification was denied. (AF 42).

On July 13, 1995, Counsel for the Employer requested reconsideration and reopening or review of the denial of labor certification (AF 45-54). The CO denied reconsideration on September 15, 1995, and on October 3, 1995, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On December 4, 1995, an Order was issued allowing the Employer to submit a brief on or before January 8, 1996. Counsel for the Employer submitted an Appeal Brief dated January 11, 1996, and received on January 16, 1996.

Discussion

The issue presented by the appeal is whether the alternate experience requirement of two years of experience as a Housekeeper is unduly restrictive under 20 C.F.R. § 656.21(b)(2).

We have recently considered the use of alternative experience requirements *en banc* in the matters of *Francis Kellogg, et al.*, 94-INA-465, 94-INA-544, 95-INA-68 (Feb. 2, 1998) (*en banc*). In *Kellogg* we held first that any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the employer's stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job

in the *D.O.T.*[3], and shall not include requirements for a language other than English (20 C.F.R. § 656.21(b)(2)). However, there are legitimate alternative job requirements, which can, and should be permitted in the labor certification process. But, these alternatives must be substantially equivalent to each other with respect to whether the applicant can perform in a reasonable manner the duties of the job being offered. Thus, where an employer's primary requirement is considered normal for the job in the United States and the alternative requirement is found to be substantially equivalent to that primary requirement (with respect to whether the applicant can perform in a reasonable manner the duties of the job offered), the alternative requirement must also be considered as normal for a § 656.21(b)(2) analysis.

Secondly, we held in *Kellogg* that where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. See, *Kellogg, supra*.

Clearly the instant case has not been considered in light of our decision in *Kellogg*, and there are no other grounds cited by the CO in the final determination. Therefore, this matter will be Remanded for reconsideration and possible re-advertisement in light of our holding in *Kellogg*.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for appropriate action.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges

[3] The job requirements listed in *D.O.T.* definitions are found in the definition trailer. Those requirements relate to levels of physical demands, general educational development, and specific vocational preparation.

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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.